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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 12

Consolidated with Nos. 27 and 28

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

I. APPELLEES' STATEMENTS OF FACTS.

Several inaccuracies appear in the statements of facts in the briefs of the Milwaukee Road Commuters' Association (hereinafter called the "Association"), and the State of Illinois and Illinois Commerce Commission (hereinafter collectively called the "State"). Some are repeated in their arguments and will be dealt with later in this reply brief.

The Association, as it did before the Interstate Commerce Commission and the District Court, accuses appellant of representing to the Illinois Commerce Commission that depreciation and maintenance of way expenses should not be considered as out-of-pocket expenses (pp. 15, 52).[1] At no time did appellant state or imply that the expenses in question were not out-of-pocket expenses (R. 359).

It is asserted by the Association, without support of the record, that appellant dieselized its suburban service as a result of the evidence in the State Commission proceeding (pp. 20, 41). Any assumption that appellant relied on the erroneous estimates of a transportation engineer 1000 miles distant from its operations rather than on its own extensive experience with dieselization, is in error.

The State suggests that there is no showing that the four months used in computing actual expenses of the diesel operation are average months (p. 3). It was agreed by the parties before the Interstate Commerce Commission that the four months in question could and should be used in computing the expenses affected by dieselization (R. 194, 195). The State's suggestion that certain diesel locomotives employed in the suburban service were "retired" from main line service is inaccurate (pp. 3, 4). These units, only seven and eight years old, were simply transferred from the through passenger to the suburban service.

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[1] Page numbers, unless otherwise indicated, refer to the brief of appellees to which reply is directed.

II. DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Appellant is in full accord with the Association (p. 33) and the State (p. 11) that there must be a showing and a finding by the Interstate Commerce Commission of undue, unreasonable, or unjust discrimination by the intrastate suburban fares against interstate commerce. The Interstate Commerce Act is silent, however, as to what constitutes such discrimination. This was left to the expert judgment of the Interstate Commerce Commission to be determined from the facts of each case.

> "The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates." *Florida* v. *United States*, 292 U. S. 1, 12.

The Commission, in the exercise of its expert judgment, found that appellant's intrastate suburban fares caused, and unless increased to the extent prescribed would continue to cause, undue, unreasonable, and unjust discrimination against interstate commerce (R. 36).

Some attempt is made by the Association to escape the application of Section 15(a) to the present proceeding (pp. 30-32). Section 15(a), of course, confers no power to fix any kind of rate, but requires the Commission in the exercise of its powers under other sections, such as Section 13(4), to give due consideration, among other things,

> "... to the need in the public interest, of adequate and efficient railway transportation service at the lowest

> cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

This is confirmed by the reference to the "dovetail relation" between Sections 13(4) and 15(a) in *Railroad Commission of Wisconsin* v. *Chicago, B. and Q. R. Co.*, 257 U. S. 563, 586.

A. Disparity of Intrastate Fares.

The District Court mentioned no need for a comparison of appellant's intrastate suburban passenger fares and its interstate passenger fares. The Association, however, contends that to support a finding that intrastate fares discriminate against interstate commerce, the intrastate fares must be lower than the interstate fares for similar service (pp. 34, 35). Both the Association (p. 33) and the State (p. 2) recognize that this is not a case involving preference or prejudice of persons or localities, but of alleged undue, unreasonable, or unjust discrimination against interstate commerce. They fail, however, to appreciate the difference in the issues to which this Court called attention in *Florida* v. *United States*, 282 U. S. 194, 214:

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to income."

Disparity between interstate and intrastate fares is thus no standard of discrimination against interstate commerce.

Even were it necessary, contrary to the holdings of this Court, to show disparity between interstate and intrastate fares, the disparity is obvious from the Association's evidence that the interstate coach fares of appellant produce from 2.3¢ to 2.53¢ a passenger mile (p. 11, R. 350), whereas the intrastate suburban fares which the Interstate Commerce Commission found to discriminate against interstate commerce produced an average of only 1.62¢ a mile, and some but 1¢ a mile.[2] The increase prescribed by the Interstate Commerce Commission of 21% will result in intrastate fares averaging only 1.96¢ a mile. The State, referring to intrastate one-way fares of 4.84¢ a mile, neglects to mention that these occurred only between nearby points to which the minimum fare of 15¢ applied, both intrastate and interstate (p. 18, R. 350).

Finally, the one-way fares, which are highest in cents per mile and therefore used for comparison by the appellees, are the very fares that the Illinois Commerce Commission has conceded could properly be raised to the level prescribed by the Interstate Commerce Commission. On page 8 of its exceptions to the examiner's proposed report, the Illinois Commerce Commission said:

> "Perhaps the allowance of a minimum fare of 25¢ per trip and one way fares based on approximately a 3¢ mile could be established to allow respondent 'similarity' with the North Western. This would relieve some of the out-of-pocket expense and should be the upper limit in altering intrastate suburban passenger fares."

The Association errs in stating that the Interstate Commerce Commission in *State of Illinois* v. *United States*,

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[2] For example, an unrestricted monthly ticket, customarily regarded as the equivalent of a 60-ride ticket, between Chicago and Elgin, a distance of 36.8 miles, produced revenue of only 1.0¢ a mile (R. 415).

101 Fed. Supp. 36, had disapproved an increase in one-way and round-trip fares because the existing fares were already as high or higher than interstate fares (p. 37). An increase in such fares was not granted because the other suburban fares, as increased, produced ample revenue to pay not only the out-of-pocket but the full cost of the suburban service, plus a return on investment of 3.2%.

Thereafter the Illinois Central Railroad's one-way and round-trip intrastate suburban fares were increased to 3.33¢ a mile, compared to 2.75¢ a mile for one-way and 2.5¢ for round-trip interstate coach fares. Notwithstanding that the one-way and round-trip suburban fares were already higher than the interstate fares, the Interstate Commerce Commission on March 1, 1957 found them to result in unjust discrimination against interstate commerce, and the Illinois Commerce Commission authorized a 15% increase to 3.8¢ per mile. *Illinois Central Suburban Fares*, 300 I. C. C. 53, 59, 63, 64.

Appellant's intrastate and interstate suburban fares are now on the same level. Appellant's intrastate and interstate nonsuburban fares are likewise on the same level. The relationship of its suburban intrastate and nonsuburban interstate one-way and round-trip fares[3] is the same as on the Chicago and North Western, and Chicago, Rock Island and Pacific railroads. (*Ex Parte 202, Increased Fares, Eastern and Western Railroads*, 1956, 298 I. C. C. 278; *Commutation and Multiple Fares in Illinois and Wisconsin*, 288 I. C. C. 15, 25; R. 437-439).

B. The Fair Contribution Question.

By tortuous argument the Association (pp. 38-40) and the State (pp. 11-23) attempt to support the District

[3] There are no multiple or commutation fares in non-suburban interstate service.

Court's ruling that the Interstate Commerce Commission order is invalid for lack of a finding of the intrastate suburban traffic's fair proportionate share of the total system revenue of appellant.

This Court has repeatedly made it clear that the obligation of the intrastate suburban fares, as of any other intrastate traffic, is to produce a fair share of the revenue *necessary to meet the maintenance and operating costs and to yield a fair return on the value of property devoted to transportation.* *Louisiana Public Service Commission* v. *T. & N. O. R. Co.*, 284 U. S. 125; *United States* v. *Louisiana*, 290 U. S. 70; *North Carolina* v. *United States*, 325 U. S. 507; *King* v. *United States*, 344 U. S. 254.

The fair share of revenues necessary to meet operating and maintenance costs is the amount thereof attributable to the service in question. As shown in our opening brief (pp. 21-22), the costs include not merely the out-of-pocket costs, which over a period of time would be avoided if the suburban service were discontinued, but also costs incurred jointly with other traffic such as maintenance of way and structures, general expenses, and taxes. *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 596. The Supreme Court of Illinois also has instructed the Illinois Commerce Commission that the proper cost of appellant's suburban operation includes a full proportion of the expenses incurred for all traffic of which its suburban operation is a part. *Fleming* v. *Illinois Commerce Commission*, 57 N. E. 2nd 384, 390-392.

The evidence in this case disclosed that appellant's intrastate suburban fares produced no return whatever on the value of property devoted to transportation. Further, the fares failed by $1,844,206.27 to meet the full cost of the suburban service (R. 384, 388). Even on

the lower full-cost basis as claimed by the Association, the deficit suffered by appellant was approximately 1.5 million dollars a year (R. 431). Finally, as found by the Interstate Commerce Commission, the rates failed to meet even the bare out-of-pocket cost by $306,038 a year (R. 34).

The District Court's ruling and the arguments of the Association and State that there must be a finding as to what would be a fair proportionate share of the railroad's total revenues to be contributed by the intrastate suburban traffic need only be followed to their illogical conclusion to demonstrate their fallacy. Should the Interstate Commerce Commission find that the intrastate suburban fares must contribute a certain proportion of the railroad's total revenues, any change in the railroad's total revenues would necessitate a change in the intrastate suburban fares. If appellant's earnings, through increased freight rates or increased tonnage should double, the suburban revenue would likewise have to double. Certainly no one could seriously contend for such an incongruous result.

North Carolina v. *United States*, 325 U. S. 507, upon which the District Court, Association, and State chiefly rely, specifically recognizes that the prerequisite to the exercise of the Interstate Commerce Commission's power under Section 13(4) is the failure of the intrastate traffic to contribute its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property directed to the transportation service. In the face of evidence in the *North Carolina* case indicating that the intrastate fares were more than sufficient to cover the full cost of the service, this Court required some support for the finding of discrimination against interstate commerce. This could have

been supplied by a showing and finding that the intrastate fares failed to produce a fair share of the earnings required to yield a fair return on the value of property directed to the transportation service. In the absence of such finding or of a finding that the fares were "less than compensatory or insufficient to cover the full cost of service" *id.* p. 515, the Commission's order was set aside.

The District Court (R. 464) and the Association (p. 39), attempting to explain why this Court in *King* v. *United States*, 344 U. S. 254, refused to require a finding of what contribution from the intrastate traffic would constitute a fair proportion of the railroads' total income, point to the finding that the *prescribed* fares would constitute not more than a fair proportion of the railroads' total income. They fail to offer any explanation, however, how a finding with respect to prescribed fares can satisfy an alleged requirement of findings with respect to the fares under investigation. If, however, such alternate finding, or its equivalent, supports a finding that the existing fares discriminate against interstate commerce, it has, as pointed out in our opening brief (p. 20), been made.

Apparently not satisfied that the District Court has effectually distinguished the findings in the *King* case from those in this proceeding, the Association (pp. 39, 40) and the State (p. 15) point to other findings from the *King* case which, because of the specific showing and finding in dollars of the loss incurred by appellant's suburban operation, became entirely unnecessary and inappropriate herein. In the ordinary Section 13(4) case no such specific showing is made. The Commission and courts are, therefore, required to indulge in a presumption, *i. e.* that if transportation and other conditions incident to intrastate transportation are less or no more favor-

able than for interstate transportation, then intrastate rates below the level of just and reasonable interstate rates do not contribute their fair share to the cost of operating and maintaining the railroad or yield a fair return. The need for such presumption is completely obliterated by the positive proof and finding herein of the inadequacy of the intrastate fares, which proof was made possible by the segregation of revenues and expenses of the suburban operation.

Such proof and finding also satisfy the basis for the dissent in the *King Case* of two justices who, speaking through Justice Douglas, said:

> "The Commission, of course, is authorized to regulate intrastate rates so that intrastate operations will provide a fair share of the carriers' revenue. See *Wisconsin Commission* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563. But that authority rests on the Commission's power to remove discrimination. If, for example, intrastate freight operations fail to produce an adequate return as determined by reference to the cost of the intrastate operations and the investment in the intrastate business, interstate commerce is discriminated against." *id.* p. 278

The State attempts to compare the operating ratio (ratio of operating expenses to revenues) of the suburban service to the passenger operating ratio of Class I railroads, and concludes that the suburban service is maintaining its end better than the rest of the passenger service (p. 15). The comparison purports to show that appellant's suburban operating ratio in 1954 was only 114.8% compared to an average of 157.6% for the Western District in which appellant operates and 138.16% for all districts. The State overlooks that the district and national averages are computed on the full cost of service and not merely on the out-of-pocket cost which it

used in computing appellant's suburban operating ratio. Comparing like with like, we find that the operating ratio of appellant's suburban service for 1954 was 185.29% after adjustment of expenses to reflect savings from dieselization (R. 382, 388). The general passenger operating ratio of appellant, concerning which the State says there is no evidence, is shown on page 311 of appellant's Annual Report to the Interstate Commerce Commission of 1954, stipulated into the record by counsel (R. 315), to be 157.50%. The State's conclusion that the suburban service is doing better than the rest of the passenger service is clearly in error.

A new theory is now presented by the State that the Interstate Commerce Commission while masquerading under Section 13(4) of the Interstate Commerce Act, actually used its powers under Section 15 to deal with a revenue deficiency rather than a revenue discrimination of appellant's intrastate fares. Revenue discrimination obviously can result only from revenue deficiency, and Section 13(4) "dovetailed" with Section 15(a) affords all the authority necessary to correct any revenue discrimination thus caused. As stated in one of the most recent court decisions involving a Section 13(4) order, *Garden City Floral* v. *United States*, 143 Fed. Supp. 609, 613, 614:

> "In our view the evidence before the Commission warranted its finding that the intrastate rates are not bearing their fair share of the costs and expenses of the Express Agency's service. 'The determination of the Commission that the intrastate revenue for the year ending August 31, 1954, when compared with the intrastate operating expenses for the same period, left a deficit in excess of $25,000, so that for handling this intrastate traffic in Montana the railroads received no compensation, fully authorizes an increase. 'The judicial function is exhausted when

there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 54 S. Ct. 692, 694, 78 L. Ed. 1260."

The State refers to the statement in *Florida* v. *United States*, 282 U. S. 194, 214, that it is not enough for the Commission merely to find that existing intrastate rates on the particular traffic are not remunerative or reasonably compensatory (pp. 12, 24), but fails to mention that the additional findings required by the Court were simply findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service. All such findings were made herein by the Commission (R. 34, 36, 37).

Appellant disagrees with the State in its attempt to recast the basic issues as stated on page 2 of its brief:

"(1) Does the order of the Interstate Commission contain sufficient findings of fact to justify the imposition or exercise of jurisdiction to increase intrastate rates?"

(2) Are the findings of the Interstate Commission supported by substantial evidence?"

into an "ultimate" issue (p. 18):

"Will the passenger revenue deficit support the exercise of Interstate Commerce Commission jurisdiction to increase an intrastate rate which the Commission determines can be increased without any appreciable loss of traffic?"

Neither the Interstate Commerce Commission nor appellant in any way relied upon appellant's overall passenger deficit to justify the Commission's exercise of power. Certainly there was no reason to do so in the face of an annual full-cost deficit of 1.8 milion dollars a year in the suburban operation (R. 384, 388). It is entirely unfair for the State to say that merely because the Interstate Commerce Commission refused to let a deficit of the overall passenger service interfere with the removal of discrimination by the suburban fares, the Commission's action is therefore predicated upon the overall passenger deficit.

The emphasis upon appellant's overall passenger deficit comes entirely from the State. As in its comparisons of appellant's suburban operating ratio, the State offers a comparison of the out-of-pocket cost suburban deficit with the full cost deficit from appellant's total passenger operation (p. 15). Apparently carried away by the results of its disparate comparisons, the State concludes there is no undue or unreasonable discrimination against interstate commerce and in high indignation calls for brakes to be applied to loose reports and inadequate findings of the Commission! (p. 19).

The State tries to distinguish this proceeding from that in *New York* v. *United States*, 98 Fed. Supp. 855, affirmed 342 U. S. 822, which upheld an order of the Interstate Commerce Commission increasing intrastate suburban fares in New York (p. 21). The State contends that in the *New York* case the Commission merely made effective on intrastate traffic the higher commutation fares which had been found reasonable and established between stations in Connecticut and New York, and which the New York Commission had refused to grant. Here, the Interstate Commerce Commission merely made

effective for intrastate traffic the higher interstate suburban fares which had been found reasonable and had been established three months earlier between stations in Illinois and Wisconsin. (R. 37, 41-42, 75-77).

Next the State alleges that the District Court in the *New York* case approved a persons and localities preference finding by the Commission (p. 21). This is incorrect; the District Court said:

> "Since discrimination against interstate commerce is sufficient to sustain the order, we need not consider the further question as to the lawfulness of the order insofar as it finds discrimination between localities and between persons." (*id.* p. 861).

The State also refers to the findings in the *New York* case of the relationship of commutation traffic to the total operation and of the reasonableness of the interstate rates. What particular relationship is meant is not clear. As heretofore shown, however, the only relationship concerned in a revenue discrimination case is that of the revenue from the intrastate fares to the revenue required to pay the full cost of the service plus a fair return. As in the *New York* case, a finding was made of the reasonableness of appellant's interstate suburban fares in this proceeding (R. 37).

The State, without citing any authority, would require not merely a finding as to what revenue from intrastate suburban fares would be a fair proportion of the total revenues of the railroad, but that the revenue from all intrastate traffic, passenger and freight, fails to make a fair contribution (p. 22). The Commission has many times entered Section 13(4) orders, reviewed by this Court, in which only a portion of the carrier's intrastate operations was involved. No evidence or finding of the

contribution made by the other intrastate operations has ever been required. The reason is clear from the wording of Section 13(4) which states that:

> "Whenever . . . the Commission . . . finds that *any* such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination." (Emphasis supplied).

Moreover, this Court has declared that the purpose of the Transportation Act, of which Section 13(4) is a part, is to make the interstate commerce system adequate to the needs of the country by securing for it a reasonably compensatory return for *all* the work it does. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 589.

The Interstate Commerce Commission is not relieved of its duty under Section 13(4) to remove discrimination against interstate commerce by the absence of a finding of what the rates of other intrastate traffic, not under investigation, contribute.

III. EVIDENCE SUPPORTS FINDING THAT PRESCRIBED FARES ARE JUST AND REASONABLE.

The Association's entire argument of the inadequacy of evidence to support the finding that the prescribed fares are just and reasonable rests upon a false premise that the sole test thereof was a comparison with the Chicago and North Western's suburban fares. Our opening brief (pp. 23, 24) points out the extensive evidence in the record by which the Interstate Commerce Commission was informed in detail of the plant, facilities, and personnel required in the suburban service, the exact cost of providing and inadequate revenue received from the service, and of fares of numerous other suburban carriers in the Chicago area showing that the increased fares sought by appellant, averaging 8.4% higher than the increase actually granted, would result in fares well within the zone of reasonableness.

In upholding a finding by the Commission of the reasonableness of certain prescribed minimum rates, based on evidence of similar nature, this Court said:

> "Comparisons of other rates in the same or adjacent territory, while not a conclusive test of reasonableness of a rate under investigation, have probative value. There was much other evidence bearing upon the character of the service and cost." *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, 480.

The Association's statement that suburban fares of the Chicago and North Western Railway were fixed in 1952 to cover an operation of 72 steam locomotives and three diesels as compared to the present diesel operation of appellant, is incomplete (p. 13). The same fares continue to apply although the North Western, at the time of the hearing on appellant's fares before the Interstate

Commerce Commission, was well along in its program of completely dieselizing its suburban service (R. 68, 347, 437-439).

The Association also contends that appellant's operations are much more comparable to those of the Chicago, Rock Island and Pacific than the Chicago and North Western (pp. 46, 47). The Rock Island's fares, however, are currently on the exact basis prescribed by the Interstate Commerce Commission for appellant (R. 437-439).

The State, advancing another novel theory of the law, suggests there is a difference in the reasonableness of the rates established under Section 13(4) and under Section 15 (p. 23). What the difference is, however, the State does not explain. The fact that the Interstate Commerce Commission is presently investigating its uniform system of accounts in no way discredits, as the State implies, appellant's showing of loss (p. 24). Such investigation may well leave the present system intact or may change it so as to increase the deficit attributable to the suburban service. If a railroad is not permitted to present its revenues and expenses from its accounts kept as the law requires, the Interstate Commerce Commission could never perform its duty of determining whether an intrastate fare discriminates against interstate commerce.

> "It can not be supposed that Congress, in placing this duty on the Commission, intended, in the absence of some express provision compelling it, that the Commission should follow a procedure which would preclude its acting effectively, if at all." *United States v. Louisiana*, 290 U. S. 70, 76.

IV. RIGHT OF STATE TO PRIOR OPPORTUNITY TO FIX FARES.

The Association asserts that the Interstate Commerce Commission has no power to nullify state rates unless fixed by the State upon a fair presentation of facts and accounting theory (p. 47). The intrastate fares were fixed by the Illinois Commerce Commission on September 13, 1951 (R. 25), and there has never been any criticism of the presentation of facts and accounting theory on which the State Commission then relied.

The Association assumes some duty on the carrier to present its case first to the State Commission before the Interstate Commerce Commission can act to remove discrimination against interstate commerce, and that such duty is not discharged when the carrier presents a case different in fact and theory than later presented to the Interstate Commerce Commission (51-53). These assumptions are without benefit of law. Both this Court, in *Florida* v. *United States*, 282 U. S. 194, and the District Court in *State of Illinois* v. *U. S.*, 101 Fed. Supp. 36, have recognized that the powers conferred by Section 13(4) upon the Interstate Commerce Commission are in no way contingent upon prior state action. Appellant, however, did go to the State for relief from its huge suburban loss more than 2½ years before finally turning for help to the Interstate Commerce Commission. It is noteworthy that when appellant presented its evidence to the Interstate Commerce Commission in accordance with the formula of the Commission's cost finding bureau for computing revenues and expenses of a suburban operation, not one protest was raised by the Association or the State. On the contrary, the State later insisted that appellant supply additional evidence which had not been presented in the Illinois Commerce Commission proceeding (R. 74, 75).

The Association states that the report of the Interstate Commerce Commission finds that the order of the State Commission was sustained by the case presented to it, modified to reflect the change in suburban operations (pp. 19, 51). No mention is made that the change (dieselization) occurred some two years after appellant presented its case to the Illinois Commerce Commission, and more than a year after the record had been closed. Nor does the Association mention certain other "adjustments" by the State Commission which disregarded other operating expenses of nearly $400,000 (R. 31). Appellant's case before the State Commission presented an out-of-pocket loss of $1,259,942 a year (R. 80). The Association concedes $863,925 thereof, plus additional fully distributed expenses annually of $1,280,029 (R. 428). There is little similarity between the foregoing figures and the finding of the Illinois Commerce Commission, purportedly based upon appellant's showing, of a profit of $224,000 a year (R. 86).

But whether or not the order of the State Commission was correct would seem entirely immaterial in view of the following from *State of Illinois* v. *United States*, 101 Fed. Supp. 36, 40, affirmed 342 U. S. 930:

> "The power and authority of the Illinois Commerce Commission and jurisdiction of the Circuit Court of Cook County are limited to interpreting and applying the statutes of the State of Illinois, creating and giving power to the Illinois Commerce Commission. It may very well be that, under the Illinois law, the Illinois Commerce Commission's report and finding are proper. Even if the Circuit Court of Cook County had already sustained the report of the Commission and the matter had been finally concluded the Interstate Commerce Commission would still have the power and authority under 49 U. S. C. A. § 13(4), to hear the petition in the instant case.

> and this court would have jurisdiction to determine whether or not the findings, conclusions and order of the Interstate Commerce Commission were founded upon and warranted by substantial evidence."

The State strongly implies; if not outrightly asserts, that the order of the Interstate Commerce Commission was not set aside because of lack of an opportunity for the State Commission to fix the fares on the same evidence and basis as the Interstate Commerce Commission (p. 26). Thereafter, however, the State asserts that if this is a revenue deficiency and not a revenue discrimination case, the State Commission must be given such opportunity (p. 27). Inasmuch as the Interstate Commerce Commission's order is clearly predicated on a finding of discrimination against interstate commerce, there seems little need to pursue the dubious distinctions attempted by the State.

Both the Association (p. 51) and the State (p. 29) suggest that an application should have been made jointly to the Illinois Commerce Commission and the Interstate Commerce Commission for adjustment of the suburban fares. Inasmuch as appellant's petition to the Illinois Commerce Commission was coupled with a request for leave to discontinue certain lightly patronized trains (R. 24, 25) over which the Interstate Commerce Commission has no jurisdiction, such petition was presented exclusively to the Illinois Commerce Commission. Appellant then had full faith and confidence that the Illinois Commerce Commission would deal fairly and promptly with the request for relief and, accordingly felt no need to bring in the Interstate Commerce Commission to see that the State Commission performed its duties in fixing compensatory intrastate fares.

Further, appellant could in no way compel a joint hearing. Such procedure rests entirely in the discretion of the regulatory bodies. Appellant had already had its day—several of them—before the Illinois Commerce Commission. If that body desired to sit jointly with the Interstate Commerce Commission, it had every opportunity to do so. Instead, it chose to appear before the Interstate Commerce Commission in opposition to appellant. Shortly after Section 13(4) was enacted, a joint committee of the Interstate Commerce Commission and the National Association of Railroad and Utilities Commission (an organization of state commissions) adopted the following report:

> "It is our judgment that State commissions would not expect or desire to participate in a judicial capacity, in joint hearings with members of the Interstate Commerce Commission or its examiners in any case in which they appear as advocates." *Interstate Commerce Acts Annotated*, Vol. 3, p. 1834.

V. THE INTERSTATE SUBURBAN FARES.

It is contended by the State (p. 32) and the Association (pp. 54-56) that the District Court properly set aside the Commission's order increasing appellant's interstate suburban fares. The State, however, expresses strong doubt that the interstate fares were actually set aside by the District Court's decree, and refers to its motion to affirm wherein it quoted from the District Court's opinion and decree to show that the Court did not intend to set aside the interstate fares (p. 32).

The District Court set aside the Commission's order because of alleged absence of (1) a finding regarding the contribution required of intrastate fares (R. 463, 467); (2) sufficient evidence to support the finding that the prescribed intrastate fares will be just and reasonable

for the future[4] (R. 467-469); and (3) prior opportunity of the State to adjust the intrastate fares on the same evidence and basis as done by the Interstate Commerce Commission (R. 469, 470). Not one of these alleged deficiencies has any possible relevancy to the lawfulness of interstate fares. Further, inasmuch as the supposed deficiencies afforded no justification for the District Court to set aside the intrastate fares, as shown in our opening brief, there was no reason for appellant to treat separately the interstate fares.

VI. DISCRIMINATION AGAINST INTRASTATE COMMERCE.

All of the State's contentions concerning an alleged discrimination by the prescribed fares against intrastate commerce (pp. 30-32) are mere restatements of previous arguments (pp. 12, 18, 19 and 22) to which reply has already been made (pp. 5, 10, 11 *supra*). The State's suggestion that the refund of over $500,000 which appellant would be required to make if the Commission's orders are set aside, would not come from other earnings producing a bare 2% return, is not realistic (p. 31). The suburban deficit increased by the amount of such refund, could only be met by a further drain on the system earnings.

VII. EFFECT OF THE ORDER ON THE STATE COMMISSION'S JURISDICTION.

The Association (p. 41) and the State (p. 20) bewail the loss of jurisdiction by the Illinois Commerce Commission of appellant's intrastate fares. Appellant first sought relief from the suburban deficit from the State

[4] In opening its discussion of this topic the District Court said: "We are confronted with the question of whether the evidence before the interstate commission supports its finding that the intrastate fares which it has prescribed will be just and reasonable for the future" (R. 467).

Commission and waited two years and four months for an order refusing an adjustment in fares. Appellant also sought to file with the State Commission its tariff naming the increased fares prescribed by the Interstate Commerce Commission and was rebuffed by an order suspending the fares. Had the Illinois Commerce Commission permitted the fares to take effect, it would have retained all of its jurisdiction. Actually all it has lost is its power to compel appellant to maintain suburban fares lower than those prescribed by the Interstate Commerce Commission. There is no reason to believe to be permanent even this partial restriction on the State Commission's jurisdiction, because

> "; . . when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion." *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 591.

Respectfully submitted,

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